SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 407

COMMONWEALTH OF VIRGINIA EX REL. TOWN OF APPALACHIA, VIRGINIA, FRITZ KLIENICK, TRADING AS KLIENICK MOTOR CO., ET AL.,

Petitioners,

vs.

OLD DOMINION POWER COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

M. M. Hruber,
H. C. Bolling,
Counsel for Petitioners.

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COMMONWEALTH OF VIRGINIA, AT THE RELATION OF TOWN OF APPALACHIA, VIRGINIA, FRITZ KLIENICK, TRADING AS KLIENICK MOTOR CO., R. C. BRAY, DR. R. W. HOLLY, OLD DOMINION DRUG COMPANY, INC., BOYD LEWIS, TRADING AS LEWIS GROCERY STORES, A. NEEGAN, TRADING AS CINCINNATI BARGAIN STORE, DRS. PETERS AND HANDY, TRADING AS MASONIC HOSPITAL, DR. FRANK E. HANDY, W. C. MITCHELL, TRADING AS MITCHELL'S BARBER SHOP, HURT-YOUNG HARDWARE COMPANY, INC., W. R. YOUNG, J. A. HURT, D. W. LARGE, TRADING AS ACME DRUG CO., J. W. LARGE, E. S. SMITH, L. D. DAUB, TRADING AS TWENTY MINUTE SHOE SHOP, A. O. CARTER, ARCHIE RAGAN AND R. H. BOLLING

vs.

OLD DOMINION POWER COMPANY, INC.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorables the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioners, the Town of Appalachia, Virginia, and Fritz Klienick, trading as Klienick Motor Co., R. C. Bray,

Dr. R. W. Holly, Old Dominion Drug Company, Inc., Boyd Lewis, trading as Lewis Grocery Stores, A. Neegan, trading as Cincinnati I Bargain Store, Drs. Peters and Handy, trading as Masonic Hospital Dr. Frank E. Handy, W. C. Mitchell, trading as Mitchell's Barber Shop, Hurt-Young Hardware Company, Inc., W. R. Young, J. A. Hurt, D. W. Large, trading as Acme Drug Co., J. W. Large, E. S. Smith, L. D. Daub, trading as Twenty Minute Shoe Shop, A. O. Carter, Archie Ragan and R. H. Bolling, respectfully submit their petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of Virginia in the above-entitled case.

The Supreme Court of Appeals of Virginia, by a final order entered on June 6, 1945, affirmed an order of dismissal entered by the State Corporation Commission of Virginia in said case on September 27, 1944.

Statement of Case

The Old Dominion Power Company, Inc., the respondent herein, is a Virginia public service corporation, owning and operating facilities in the counties of Wise and Lee, in that state, for the generation, distribution and sale therein of electrical energy. It purchases about one-third of its power for distribution in its two-county territory from the Kentucky Utilities Company, a Kentucky Corporation, of which it is a wholly owned subsidiary, through a meter at or near the Virginia-Kentucky state line.

At all times prior to July 23, 1941, said Old Dominion Power Company sold electrical energy upon rates of charges which applied uniformly to consumers of similar classes throughout the territory served by it. There are eight or nine incorporated towns in the territory. In June, 1938, the company's franchise from the town of Appalachia expired, and in June, 1939, its franchise from the town of Norton

expired. The petitioners herein are residents of said two towns. Prior to the expiration of these franchises, the two towns took the position that any renewals thereof should be for periods not longer than ten years. The power company demanded renewals for twenty years or longer. (Article 125 of the Constitution of Virginia, prevents such franchises from being for periods longer than thirty years).

Due to the adverse positions of the parties, the power company's franchises in the two above-mentioned towns were not renewed at their respective expiration dates. However, the power company continued to operate in said towns without objection on the part of the towns, pending negotiations.

In 1941, and while renewal of the power company's franchises was still the subject of negotiation, informal discussions concerning the power company's commercial and residential rates were had with the State Corporation Commission of Virginia by the representatives of the aforesaid two towns and other towns in the territory, and representatives of the power company. As a result of those discussions, the Commission informally advised the power company that a reduction of its residential and commercial rates was "in order," and that company should file new rates effecting a reduction of approximately $30,000 per year.

Thereafter, the power company initiated new rates which became effective on July 23, 1941. The new rates effected a general reduction and were put into effect by the power company without notice or hearing of any kind. It later appeared that the documents showing the reduced rates of July, 1941, contained the following clause:

> "Applicable in towns of Pennington Gap, St. Charles, Coeburn, St. Paul and Wise, Virginia; also in counties in which company has road permits or franchises,

and in such other towns in which the company owns, or hereafter acquires a twenty-year electric franchise."

The effect of the power company's enforcement of this clause was to put the reduced rates into effect in all of its territory with the exception only of the towns of Norton and Appalachia. It continued to charge the consumers in those towns upon the higher and superseded rates set forth in a schedule which had been made effective May 1, 1939. Thus for the first time in its history the power company began charging its consumers upon non-uniform rates, and for the sole reason that two towns in its territory would not grant franchise renewals for as long a period of time as that demanded (20 years) by the power company. The disagreement over the term of years of the two town franchises was the sole reason for the discrimination thus instituted as all other conditions of the consumers in the two towns were similar to those of the consumers in other parts of the small territory served by the company.

R. H. Bolling, a resident of the Town of Norton, one of the petitioners in this case, instituted a suit in the Circuit Court of Wise County, Virginia, on behalf of himself and all others similarly situated, seeking to test the legal validity of the above-mentioned "applicable" clause. The power company filed a plea in abatement, alleging that the complainant and all other similarly situated, had a full, adequate and complete remedy for their grievances by filing a complaint with the State Corporation Commission of Virginia.

The Circuit Court sustained the plea in abatement and dismissed the bill. Appeal from this action was taken to the Supreme Court of Appeals of Virginia, and that court held that it did not have jurisdiction to review said action, because the matter in controversy was "merely pecuniary" and less than the jurisdictional amount of $300 was in-

volved. *Old Dominion Power Co.* v. *Bolling,* 181 Va. 368, 25 S. E. 266.

This adverse decision was rendered on April 26, 1943, and in July, 1943, the Town Council of the town of Norton finally succumbed and granted to the power company a twenty-year renewal of franchise.

The Town Council of Appalachia did not abandon its position that it was in the public interest that the franchise renewal should be for a period not longer than ten years. The power company has refused to modify its demand for a twenty-year renewal in that town.

The power company's income was still so high that again in April, 1943, it initiated a further reduction in its residential and commercial rates, on which again there was no notice of hearing. The schedule showing these reduced rates contained a discriminatory applicable clause similar to the one contained in the reduced rates of July, 1941; and this second general reduction of rates was not made applicable by the power company in Appalachia, and not in Norton until July, 1943, when the latter town granted the power company a twenty-year franchise renewal. The consumers in Appalachia are still being charged according to the twice superseded rates of May 1, 1929. This discrimination costs them the aggregate sum of $7,500.00 per year.

On March 3, 1944, the petitioners herein filed a petition with the State Corporation Commission of Virginia, complaining of the over charges for services exacted by the power company from its patrons in the town of Norton from July, 1941, until July, 1943, and from its patrons in the town of Appalachia from July, 1941, to the time of the filing of the petition.

The prayer of the petition was, in brief, (1) that the respondent be required to ascertain and report the amounts of overcharges made and collected by it in the towns of

Norton and Appalachia by virtue of the purported authority of the above mentioned "applicable" clauses; (2) that respondent be required to make reimbursement to those entitled for such overcharges, and that other incidental relief be granted; and (3) that respondent be restrained and enjoined from further attempting to enforce the provisions of the illegally discriminatory clauses against its patrons in Appalachia.

The basic contention of petitioners before the State Corporation Commission was the same as that made in the suit in the Circuit Court of Wise County, that is, that the "applicable" clauses were utterly void and illegal because in direct contrevention of the Virginia statute, section 4066, Michie's 1940 Code of Virginia, and contrary to the declared public policy of the state. *Massaponax Sand and Gravel Co.* v. *V. E. P. Co.*, 166 Va. 405, 186 S. E. 3. The pertinent provisions of said statute are in the following words:

> " 'It shall be the duty of every public utility to furnish reasonably adequate service and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring same and not engaged in a similar business, and *to charge uniformly therefor all persons or corporations using such products under like conditions*, and not in competition with such furnishing company.' "

The respondent filed an answer to said petition and also a motion to dismiss same on the grounds that the State Corporation Commission was "without authority to grant the relief prayed for in said petition." The motion was taken under advisement and evidence was adduced by both sides. On September 29, 1944, the Commission filed its opinion and entered an order sustaining the motion to dismiss.

It might be said that the evidence showed that the only ground for the discrimination being practiced by the power company was the matter of the dispute over the term of years of the franchise renewals with the towns of Norton and Appalachia. It was admitted that otherwise the conditions of the consumers in the two towns were similar to the conditions of other consumers served by the company in its two-county territory. That such discrimination is unlawful under Virginia law was the main contention of the petitioners. The State Corporation Commission dealt with the question by way of dicta, but the Supreme Court of Appeals ignored it.

In the appeal from the State Corporation Commission to the Supreme Court of Appeals the petitioners assigned as error, among other things, that the Commission's denial of any relief for the grievances set forth in the petition, unless and until overruled and superseded by an award of appropriate relief, constituted a denial by the state of Virginia of the equal protection of the laws of the state, contrary to the provisions of Article XIV, Section 1, of the Amendment to the Constitution of the United States. This assignment of error was relied upon by the petitioners in the Supreme Court of Appeals and was argued both orally and by written brief.

The Supreme Court of Appeals, however, chose to ignore and evade the question while affirming the Commission's denial of its jurisdiction to grant *any* relief to the petitioners. The state court did not overrule its holding in the case of *Massaponax Sand and Gravel Co.*, v. *V. E. P. Co.*, 166 Va. 405, 186 S. E. 3; nor did it hold that the provision of Virginia Code, Section 4066, requiring uniformity of charges by public service corporations does not mean what it plainly states. On the other hand, the state court undertook to dispose of the petitioners' case by holding that it was an application to the State Corporation Com-

mission of Virginia, to *prescribe* rates of retroactive effect, which the Commission admittedly does not have the right to do. *Commonwealth, Ex Rel,* v. *Old Dominion Power Company,* 184 Va. 6, —— S. E. ——.

As the record in the case shows, the petitioners particularly pointed out that their case was not an application for *fixing* of rates by the State Corporation Commission, but was an invocation of judicial power of the Commission to pass upon the legality of the hereinabove mentioned "applicable clauses." The jurisdiction of the courts of general jurisdiction had already been invoked, without avail. As the petitioners in this case have sought the aid of a court of general jurisdiction, and of the State Corporation Commission, and twice of the Supreme Court of Appeals of the state, they have now exhausted their remedies in the courts of the state.

Jurisdictional Statement

It is the contention of the petitioners in this case that the Supreme Court has jurisdiction to review this case by certiorari on the grounds that a right under the Constitution was specially set up by the petitioners in the state court and the decision was against such right. U. S. C. A. Title 28, sec. 344(b).

The right set up by the petitioners was the right to the equal protection of the laws as guaranteed by XIV Amendment. The question was raised by assignment of error on appeal from the State Corporation Commission of Virginia to the Supreme Court of Appeals of Virginia, and the point was argued and relied upon in the last mentioned court (State Court Record, pages 9, 42, 43, and 44).

The Supreme Court of Appeals of Virginia evaded and ignored the constitutional question in its order and opinion, and merely said: "While the argument in the briefs has

taken a wide range the issue is really within a narrow compass."

As appears from its opinion, the state court undertook to dispose of the case upon local or state grounds; however, by denying to the petitioners the benefit of a Virginia statute, the state court in effect deprived the petitioners of equal protection of the laws.

The following cases are believed to sustain the jurisdiction of the Supreme Court in this case. *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 266, 41 L. Ed. 994, 17 S. Ct. 992; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 34 S. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N.S.) 525; *Fox River Paper Co.* v. *R. R. Commission of Wisconsin*, 47 S. Ct. 669, 274 U. S. 651, 71 L. Ed. 1279.

A copy of the opinion of the Supreme Court of Appeals of Virginia in this case appears at page 228 of the Record.

The Question Presented

The question presented in the case is whether or not the State of Virginia, by judicial action, deprived the petitioners of equal protection of the laws of the state of Virginia contrary to the provisions of XIV Amendment of the United States Constitution. As shown in the foregoing statement of the case, the petitioners have exhausted their remedies in the state courts and have received no redress whatever for their grievance. Their grievance is that the state courts have failed and refused to apply and enforce a written statute of the state, providing that it shall be the duty of every public utility to charge uniformly all persons using its services under like conditions. The Code of Virginia, section 4066.

The state courts while not holding that the statute had no meaning or application, nevertheless, studiously evaded intrepretation and application of the statute with trans-

parent sophistry. As shown by the record in the case, and as pointed out in the statement of the case herewith, this claimed judicial impotency of the Virginia courts has damaged the petitioners in a very real and substantial way, and is still damaging them.

The non-action of the Virginia Courts has in effect legally sanctioned an arbitrary and unreasonable classification of consumers of a public utility which classification operates as a discrimination in the matter of rates between persons similarly situated and thus has deprived those discriminated against from the equal protection of the laws. *Western Ry. Co. of Ala.* v. *Ala. R. Comm.*, 197 F. 954.

For these reasons it is contended that the Supreme Court should review and reverse the decision of the court of last resort of the state of Virginia, rendered in this case. *Commonwealth, Ex. Rel.*, v. *Old Dominion Power Co., supra.* As the deprivation of the Federal right was also the deprivation of the state right, it is contended that the Supreme Court should not only reverse the decision of the Supreme Court of Appeals of Virginia, but should also render such judgment as that court should have done in the case. *Murdock* v. *Memphis,* 20 Wall. 590, 22 L. Ed. 429; *McLaughlin* v. *Fowler,* 154 U. S. 663, 14 S. Ct. 1192, 26 L. Ed. 176.

Prayer

Wherefore, the petitioners pray that this court may grant a writ of certiorari to review the judgment complained of.

M. M. Heuser,
H. C. Bolling,
Norton, Virginia,
Counsel for Petitioners.

IN THE

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COMMONWEALTH OF VIRGINIA, AT THE RELATION OF TOWN OF APPALACHIA, VIRGINIA, FRITZ KLIENICK, Trading as KLIENICK MOTOR CO., R. C. BRAY, DR. R. W. HOLLY, OLD DOMINION DRUG COMPANY, INC., BOYD LEWIS, Trading as LEWIS GROCERY STORES, A. NEEGAN, Trading as CINCINNATI BARGAIN STORE, DRS. PETERS and HANDY, Trading as MASONIC HOSPITAL, DR. FRANK E. HANDY, W. C. MITCHELL, Trading as MITCHELL'S BARBER SHOP, HURT-YOUNG HARDWARE COMPANY, INC., W. R. YOUNG, J. A. HURT, D. W. LARGE, Trading as ACME DRUG CO., J. W. LARGE, E. S. SMITH, L. D. DAUB, Trading as TWENTY MINUTE SHOE SHOP, A. O. CARTER, ARCHIE RAGAN and R. H. BOLLING

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

E. RANDOLPH WILLIAMS
T. JUSTIN MOORE

Counsel for
Old Dominion Power Company, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To The Honorables, The Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioners ask for a writ of certiorari to review a judgment of the Supreme Court of Appeals of Virginia. The judgment of the Court appears in the printed record at page 236. The opinion of the Court upon which the judgment rests appears at page 228. The order complained of affirmed an order of dismissal of the State Corporation Commission of Virginia. The decision of the State Corporation Commission and that of the Supreme Court of Appeals of Virginia involved solely the question of the jurisdiction of the State Corporation Commission of Virginia, a creation of the Constitution and Statute Laws of the Commonwealth.

Statement of the Case

This case involves no Federal question of substance not heretofore determined by this Court or a question in any way not in accord with applicable decisions of this Court. Indeed, upon the issues presented and decided by the State Corporation Commission of Virginia and the Supreme Court of Appeals of Virginia there was no Federal question of any kind involved, nor does the decision of the Supreme Court of Appeals of Virginia or the State Corporation Commission involve a question of general interest or concern. The failure of the petitioners to secure the rights alleged arises out of their failure to resort to the obvious remedy which both the State Corporation Commission and the Supreme Court of Appeals of Virginia recognized as open to the petitioners.

The Respondent, the Power Company, as pointed out in the decision and findings of the State Corporation Commission (R.p.217), had in effect as of May 1, 1939, a schedule of rates throughout its territory. On July 1, 1941, the Power Company filed, effective as of July 23,

1941, a revision of rates, superseding the rates of May 1, 1939, with certain exceptions as to territory. The Town of Appalachia was one of the exceptions, and, as the State Corporation Commission finds (R.p.217), the revised rates which became effective July 23, 1941, were not intended to apply to or include the Towns of Norton and Appalachia. The Power Company continued to charge the rates effective May 1, 1939, in the territory excepted, including the Town of Appalachia.

The petitioners, the excepted Town of Appalachia and some of its inhabitants, did not promptly or at any time apply to the State Corporation Commission for a review of the rates effective May 1, 1939, which were the rates continued to be charged as to these petitioners, but, after considerable period, attacked the validity of the changed rates which by express exception were not applicable to them. The petitioners have not at any time asked an inquiry as to the validity of the rates effective May 1, 1939, as applied to them, but, in persistent disregard of the obvious remedy, have attacked the reduced rates applicable to others on the ground that the new schedule of reduced rates lacked uniformity in that such rates did not apply to petitioners. The jurisdiction of the Commission to hear a complaint is fully set forth in Section 156, Subsection (b), of the Constitution of Virginia quoted in the opinion of the Supreme Court of Appeals (R.p.231), and expressly provided for in Section 4066 of the Code of Virginia which is quoted in part in the opinion of the Court of Appeals (R.p.233). The petitioners asked that the new rates expressly not applicable to them be condemned, which request, if granted, would have necessarily thrown them back to the rates originally effective. They further asked the State Corporation Commission not only for judgment as to the new rates but for a retroactive judg-

ment and accounting and recovery on a retroactive finding as to the invalidity of the changed rates.

Under this state of facts about which there can be no question, the Court of Appeals in its opinion (R.p.230) said:

> "The question before us is whether, in the present proceeding, the Commission has jurisdiction to declare the rates, which were put into effect in the manner provided by law, and became effective on May 1, 1939, unjust and unreasonable as of July 23, 1941, when the revised schedule was put into effect, and to require the Power Company to refund to its customers in the Town of Appalachia the difference between the rates collected under the schedule of May 1, 1939, and those which would have been collected under the new schedule, which, the petitioners say, should, at the same time, have been put into effect in their community? Or, to state the matter tersely, has the Commission jurisdiction to put into effect, retroactively, reduced rates applicable to petitioners, and require the Power Company to refund to them the overcharges collected of them?"

The Court adds:

> "We are of opinion that the Commission correctly held that it lacked the jurisdiction to grant such relief."

It is upon a judgment of dismissal as to the jurisdiction of the Commission that the petitioners ask for a writ of certiorari. That is the whole matter.

Jurisdictional Statement

The issue presented to the State Corporation Commission and upon appeal from the Commission to th

Supreme Court of Appeals of Virginia was purely and solely, as the Commission and the Supreme Court have both declared, a question of the jurisdiction of the State Corporation Commission as determined by the Constitution and the Statute Laws of the Commonwealth of Virginia. The petitioners say that this denial of the jurisdiction constituted a denial by the State of Virginia of equal protection of the laws of the State contrary to the provisions of XIV Amendment of the Constitution of the United States. This sounds frivolous, particularly in the light of the succeeding statement of counsel, appearing in the petition, page 7,—"The Supreme Court of Appeals, however, chose to ignore and evade the question while affirming the Commission's denial of its jurisdiction to grant *any* relief to the petitioners" and in the light of the declaration of both the State Corporation Commission and the Supreme Court of Appeals that the wrong remedy was being pursued to assert the rights of the petitioners, if any they had. There was not denial of *any* relief but of relief in the manner pursued by petitioners.

Under this state of facts it would take a bold pleader to declare that this proceeding really and substantially involves a dispute or controversy as to the effect of the construction of the Constitution or the laws of the United States upon the determination of which the result depends. As this Court has repeatedly declared:

> "It must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground." (*Western Union Telegraph Company* v. *Ann Arbor Railroad Co.*, 178 U. S. 243.)

The Question Presented

There has been no denial of rights, constitutional or statutory, to the petitioners but merely a denial of the selected remedy erroneously pursued. Petitioners have yet to follow the remedy pointed out, both by the State Corporation Commission of Virginia and the Supreme Court of Appeals, to secure their rights, if any they have. Petitioners have not, as they allege in their brief, page 8, exhausted their remedies in the courts of the State but have persistently disregarded the obvious remedy as prescribed by the statutes of Virginia to have a review of alleged unreasonable and unjust charges.

In both the opinion and order of the Commission (R.p. 224), and opinion of the Court of Appeals (R.pp. 231-2), it is pointed out that the obvious remedy for the petitioners for relief against the rate which they claimed was illegal or unreasonable and unjust was to apply to the State Corporation Commission for a consideration of this rate, the rate effective May 1, 1939. This the petitioners did not do and disclaimed any purpose of doing. As the Commission said, (R.p.224);

> "The Petitioners, may at any time, come before the Commission and make complaint that the rates are unjust and unreasonable, and if, upon hearing, the facts show that the complaint is well founded, it will be the duty of the Commission to fix and order substituted for the present rates such rates as shall be just and reasonable."

In the opinion of the Court of Appeals (R.p.230), is the following:

> "It will be observed that the petitioners do not invoke the exercise of the jurisdiction of the Commission to inquire into existing rates and to prescribe reasonable and proper charges as a substi-

tute for those alleged to be unjust and unreasonable. Hence, we are not here concerned with whether the consumers of electrical energy in the Town of Appalachia are, by reason of the lower rates granted to other consumers in other territories, entitled to a similar reduction. That is a matter which should be addressed to the Commission in a proper proceeding filed with it for a reduction of the rates in that locality."

The petition for certiorari raises no Federal question substantial in character, no question of general interest, and, indeed, no arguable question of any kind and should be denied.

Respectfully submitted,

E. Randolph Williams
T. Justin Moore
Richmond, Virginia

Counsel for
Old Dominion Power Company, Inc.

October 15th, 1945.